shoot since he had fallen on the ground. All firing Troopers shot until they felt the threat was eliminated. It was very dark and the troopers did not know whether they had hit the suspect. The suspect did not go down until the Troopers' clips were empty. Trooper Hollywood then entered the woods and told the Troopers and the Police Officer to exit the woods.

Kevin P. McCann, Esquire was contacted to respond to the scene by the request of the State Fraternal Association. He conducted an investigation and was present at the scene. Mr. McCann has represented all five (5) New Jersey State Troopers since the day of the incident. Subsequently, signed statements were taken from each of the Troopers with Mr. McCann present. The State has identified Troopers Modarelli, Manzo and Moyer as targets and Troopers Carson and Hollywood as witnesses for purposes of presentment to the grand jury. Trooper Hollywood was not actually at the scene of the shooting since he was unable to enter the woods because of a barrier and Trooper Carson had his gun drawn and was committed to firing the gun, but was knocked down. All five (5) Troopers have signed written waivers, waiving their right to independent counsel and wish to proceed with Mr. McCann as their attorney.

B. Proceedings Below

The State filed a motion to disqualify Mr. McCann from further representation in this matter on or about July 6, 2004 in the Law Division of the Superior Court in the State of New Jersey. The Honorable Linda R. Feinberg granted that application on August 27, 2004, by Order filed on September 21, 2005. (App. 15). On or about October 22,

2004, Mr. McCann filed a motion for reconsideration of that Order or, in the alternative, requesting a stay of the prior Order pending appeal. On December 3, 2004, Judge Feinberg denied the application for reconsideration and also denied the request for a stay, but did direct that the matter not be presented to the grand jury for a period of at least 60 days to provide time for the parties to consult with and secure the services of counsel. (App. 22)

On or about December 6, 2004, Mr. McCann filed an Application for Emergent Relief seeking emergent review of the case, on its merits, due to the time constraints regarding the presentment of the case to a grand jury in 60 days. The Honorable Clarkson S. Fisher, Jr. denied that request.

On or about December 6, 2004, Mr. McCann filed a Notice of Appeal to the Superior Court of New Jersey's Appellate Division. On or about December 9, 2004, Mr. McCann filed a motion for acceleration of the appeal and on or about December 20, 2004, that request was granted. The State then filed a Motion with the Appellate Division to dismiss the appeal. In Mr. McCann's Opposition to the State's Motion to dismiss the appeal, he requested the Appellate Division to grant the request for leave to appeal *nunc pro tunc* or in the alternative, to postpone the grand jury presentment pending appeal. By Order of the Superior Court of New Jersey Appellate Division entered on February 17, 2005 and filed on February 22, 2005, the Appellate Division granted the State's motion to dismiss the appeal as interlocutory (App. 36-37) and denied the request to postpone the grand jury presentment pending appeal. (App. 38-39). On or about March 9, 2005, Mr. McCann filed a Motion with the New Jersey Supreme Court seeking leave to appeal. The New Jersey Supreme

Court entered an Order denying that request on April 29, 2005 which was filed on May 3, 2005. (App. 40). This matter has not yet been presented to the grand jury.

In Judge Feinberg's Order and Opinion dated September 21, 2004, she stated:

> [b]oth the Sixth Amendment to the Federal Constitution and the Article I, paragraph 10 of the New Jersey Constitution guarantee "the assistance of counsel" to all criminal defendants. This right has been construed as guaranteeing the "effective assistance of counsel," or "untrammeled and unimpaired" representation, and undivided loyalty.

App. 4. In her decision, Judge Feinberg also relied on the case of *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692 (1988). App. 6-7. Judge Feinberg also relied upon the non-controlling case of *In the Matter of Grand Jury Proceedings*, 428 F.Supp. 273 (E.D. Mich. 1976) in deciding the case at bar, by basing her decision on "the public's and the court's interest in conducting judicial affairs." App. 10, 12. Furthermore, in her Opinion resulting from the Motion for Reconsideration, Judge Feinberg states "[s]imply put, an attorney cannot simultaneously represent a party and a testifying witness in the same proceeding." App. 26.

The New Jersey Appellate division did not file a written Opinion; however, the Order indicates that the appeal was dismissed as interlocutory. App. 36. Furthermore, that same Order states "given the clear conflict in representation and disservice to the public by joint representation and coordination of defenses, the probability of success on appeal is minimal." App. 36-37. In effect, by

using this language, the Appellate Division has decided the case on its merits and has agreed with the trial court.

The Order issued by the New Jersey Supreme Court denying Mr. McCann's request for leave to appeal does not give any supporting reasoning for this determination. App. 40. In effect, the court is disallowing any relief from the disqualification order.

As discussed in more detail below, the result in this case (the disqualification of Mr. McCann from further representation in this matter) conflicts with the decision in *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692 (1988) and numerous other cases. Applying the *Wheat* analysis in this case, a potential for conflict does not exist. Furthermore, a *Wheat* analysis was not performed by the trial court as required.

REASONS FOR GRANTING PETITION

Although an individual possesses no absolute right to representation by an attorney of his choice (*United States v. Hobson*, 672 F.2d 825 (11th Cir. 1982); *United States v. Cunningham*, 672 F.2d 1064, 1071 (2d Cir. 1982); *United States v. Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975); *United States v. Sexton*, 473 F.2d 512, 514 (5th Cir. 1973)); any restriction imposed on that right will be carefully scrutinized. *United State v. Hobson*, *supra*. An individual's right to select an attorney who he believes is most capable of providing competent representation implicates both the First Amendment guarantees of freedom of association (*N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328) and the Sixth Amendment right to assistance of counsel, and will not yield unless confronted with some

overriding competing public interest. *In re Gopman*, 531 F.2d 262, 268 (5th Cir. 1976).

The Sixth Amendment right to assistance of counsel encompasses a defendant's qualified right to be represented in a criminal prosecution by counsel of his or her own choice. *See, e.g., Wilson v. Mintzes*, 761 F.2d 275, 279 (6th Cir. 1985); *United States v. Curcio*, 694 F.2d 14, 12 (2nd Cir. 1982); *United States v. Laura*, 607 F.2d 52, 53, 55-56 (3rd Cir. 1979); *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986, 98 S.Ct. 613 (1977).

> While we have recognized that a district court has some discretion to limit the exercise of the right to counsel of choice when insistence upon it would disproportionately disadvantage the government or interfere with the ethical and orderly administration of justice, *United States v. Cortellesso*, 663 F.2d 361, 363 (1st Cir. 1981), we have also warned that disqualification of defense counsel should be a measure of last resort.

United States v. Diozzi, 807 F.2d 10, 12 (1st Cir. 1986). "In moving to disqualify appellants' chosen counsel, the government bears a heavy burden of establishing that disqualification is justified." *Id.* at 12; *citing United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986).

United States Courts of Appeals have declared:

> While we have recognized that a district court has some discretion to limit the exercise of the right to counsel of choice when insistence upon it would . . . interfere with the ethical and orderly administration of justice, . . . we have also warned that disqualification of . . . counsel should be a measure of last resort.

United States v. Diozzi, 807 F.2d 10, 12 (1st Cir. 1986) (citing *United States v. Cortellesso*, 663 F.2d 361, 363 (1st Cir. 1981)). Furthermore, the government bears a "heavy burden" in demonstrating that disqualification is justified. *Id.*

A conflict of interest, can frustrate the public's interest in the fair and expeditious administration of the criminal laws. *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773 (1972). However, balanced against the potential conflicts of interest arising from multiple representation is the right of a witness to enjoy the advice of legal counsel of his choice. *In re Taylor*, 567 F.2d 1183, 1186 (2d Cir. 1977).

Underlying the principle that an attorney should represent only one client is the assumption that a conflict exists or may exist between codefendants. Although not apparent, the conflict may surface during the course of trial. However, there may be circumstances where no conflict of interest exists. Or, even if the possibility of divergence is present, the defendants tactically may desire one counsel. Since a single attorney eliminates reciprocal attacks and a joint defense may have a certain jury appeal, defendants may desire joint representation, irrespective of the possible conflict. It is their right to have such representation, for parties may surrender their constitutional right to independent counsel. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1937).

I. The New Jersey Superior Court Law Division Decision, and in Effect the Decisions of Both the New Jersey Appellate Division and the New Jersey Supreme Court Decisions, Fail to Follow an Opinion of the United States Supreme Court and Conflicts Exist Among United States Court of Appeals Regarding the Waiver of Potential Conflicts of Interest and the Application of Same at the Grand Jury Stage.

Only a few courts have ruled on whether the presence of an actual conflict in multiple representation before a grand jury may be waived by the clients. The Fifth and Fourth Circuits have indicated in dicta that if the district court held a hearing where it was clear that the defendant understood his right to conflict-free assistance and then waived that right with regard to potential conflicts involved in multiple representation before the grand jury, those circuits would sustain a district court's finding of a valid waiver. *In re Gopman*, 531 F.2d 262, 268 (5th Cir. 1976); *In re Investigation Before the February 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977). The Third and Fourth Circuits also refused to find that they had to disqualify attorneys involved in multiple representation before the Grand Jury absent a showing of actual impediment of the Grand Jury investigation. *Matter of Grand Jury Empanelled January 21, 1975*, 536 F.2d 1009, 1012 (3rd Cir. 1976); *In re Investigation Before the February 1977 Lynchburg Grand Jury*, 563 F.2d 652, 658 (4th Cir. 1977).

The Fourth Circuit refused to pass on this question when it found that the attorneys involved in a conflict of interest had failed to fully advise their clients in detail of the conflict situation. *In re Investigation Before the February*

1977 Lynchburg Grand Jury, 563 F.2d 652, 658 (4th Cir. 1977). In that case, the Court found actual conflict when witnesses invoked the Fifth Amendment and one of the attorneys was himself the target of the Grand Jury. *Id.* Furthermore, in that case, the Court held that attorneys who were representing nine witnesses who had been called to testify before the grand jury, some of whom had been informed that they were targets of grand jury investigation, had affirmative obligation to advise each of the clients, jointly and severally, in detail, of the full effect of legal consequences of conflicts which had arisen as a result of multiple representation and were required to make it clear to the district court, when the district court sought to disqualify the attorneys, that such action had been taken; absent a showing that such explanation had been made, written waivers signed by the witnesses of any potential conflict of interest were ineffective. *Id.*

The Third Circuit concluded that it was possible to waive possible conflicts of interest and concluded that "(s)uch a waiver is exactly what the district court elicited from each of the appellants at the hearings conducted in this case." *Matter of Grand Jury Empanelled January 21, 1975*, 536 F.2d 1009, 1012 (3rd Cir. 1976). The Third Circuit found no actual conflict in the multiple representation and therefore never reached the question of whether an actual conflict could be waived. The only evidence before the Third Circuit of a conflict of interest was: (1) an attorney's representation of 9 witnesses, and (2) the assertion of the Fifth Amendment by those nine witnesses before the grand jury. The Third Circuit concluded that this evidence, though presenting a conflict of interest, was insufficient to support the district court's disqualification order. *Id.*

The Fifth Circuit has not definitely determined whether the existence of a potential conflict of interest is sufficient to require the disqualification of the attorney with the potential conflict. *In re Gopman*, 531 F.2d 262 (5th Cir. 1976). There is no discussion in the leading Fifth Circuit case of the waiver question. *In re Gopman*, 531 F.2d 262 (5th Cir. 1976). In the case of *In re Gopman*, the United States Court of Appeals for the Fifth Circuit found a disqualification order proper where attorney represented labor union and officials of the union who might be guilty of record-keeping offenses. *In re Gopman*, 531 F.2d 262, 266 (1976). The Fifth Circuit affirmed the District Court's disqualification order because

> the conflict arose when, on the one hand, the interests of appellant's union clients pointed toward disclosure, but, on the other hand, appellant was advising individual witnesses as to whether disclosure should be made.

Id. at 267. This suggests that the Fifth Circuit found an actual conflict present in this case. The Fifth Circuit hints that an actual conflict could not be waived (an actual conflict was found in *Gopman*) but that a potential conflict could be waived.

> We do not indicate what merit, if any, appellant's arguments might have in a case where the ethical violation is relatively minor. We hold only that the public interest in a properly functioning judicial system must be allowed to prevail in the case presently before us.

In re Gopman, 531 F.2d 262, 268 (5th Cir. 1976). In *United States v. Mahar*, 550 F.2d 1005, 1008 (5th Cir. 1977) the Fifth Circuit indicated that a criminal defendant may assert his right to insist upon retaining an attorney with

otherwise disqualifying conflicts, and that *Gopman* did not clearly indicate whether a waiver could also occur in a pre-indictment grand jury situation.

Some circuits have indirectly concluded that a court may not disqualify an attorney from representing multiple defendants before a Grand Jury without establishing proof of an actual conflict of interest. The D.C. Circuit concluded that though an attorney represented a number of witnesses before the Grand Jury and some of those witnesses took the Fifth Amendment before the Grand Jury, this was not sufficient evidence to disqualify the attorney absent a hearing before the Court on whether the Fifth Amendment was properly invoked by the witness. *In re Investigation Before April 1975 Grand Jury*, 174 U.S.App.D.C. 268, 531 F.2d 600, 608 (1976).

In the case of *In re Special February 1977 Grand Jury*, the United States Court of Appeals for the Seventh Circuit found disqualification to be improper where there was no "testimony of evidence to indicate" that the immunized witness could incriminate attorney's other clients. *In re Special February 1977 Grand Jury*, 581 F.2d 1262, 1265 (1978). In this case, the Court of Appeals affirmed the district court's denial of a motion to disqualify an attorney named Tucker who represented multiple witnesses who had been subpoenaed to appear before the grand jury:

> It is true, as the Government points out, that two of Tucker's clients have been immunized. But, significantly, at the hearing that was held on the disqualification motion, there was no testimony or evidence to indicate that these immunized witnesses can incriminate Tucker's other clients.

Id. at 1265.

In the case of *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977), the court of appeals reversed an order of the district court disqualifying an attorney named Erlbaum who represented several subpoenaed witnesses. The Court stated that

> [b]y granting the Government's motion to disqualify Mr. Erlbaum before a single question has been asked of appellant [the witness] by the grand jury, the court is concluding that Mr. Erlbaum's representation of appellant will frustrate the work of the grand jury.

Id. at 1190. In that case, the court further stated that a motion to disqualify the grand jury witness' attorney was premature, where the witness had not yet appeared before the grand jury, he had not indicated that he intended to invoke his privilege not to testify on the ground of self-incrimination and he had not been formally offered immunity in exchange for his testimony, and only if that stage were reached when offer of immunity was approved but witness refused on advice of counsel to answer a proper question, would the issue of the attorneys' conflict of interest in continuing to represent witness and other witnesses be ripe for hearing. *Id.*

> When a potential or actual conflict of interest situation arises, it is the court's duty to ensure that the attorney's client, so involved, is fully aware of the nature of the conflict and understands the potential threat to the protection of his interest. Once the court is satisfied, however, that such a client knowingly and intelligently wishes to proceed with joint representation, the court's responsibility is met, and it is without power unilaterally to obstruct the choice of counsel.

Id. at 1191. *See Abraham v. United States*, 549 F.2d 236 (2d Cir. 1976); *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975).

"The Government possesses the power to create a conflict in all situations in which targets of a grand jury investigation or defendants at trial are represented by a single attorney," and such a conflict is created by the Government's desire to compel the witness to give particular testimony before the grand jury. *Id.* at 1191.

> This court has on numerous occasions declined to adopt a rigid "single representation" rule in situations of actual as well as potential conflict, in favor of allowing a client to retain counsel of his choice with full knowledge of the potential adverse consequences of such representation.

Id. at 1191-1192, *citing Abraham v. United States*, 549 F.2d 236 (2d Cir. 1976); *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States v. Mari*, 526 F.2d 117 (2d Cir. 1975), *cert. denied*, 429 U.S. 941, 97 S.Ct. 1557 (1973); *United States v. Sheiner*, 410 F.2d 337 (2d Cir.), *cert. denied, Piacentile v. United States*, 396 U.S. 859, 90 S.Ct. 127 (1969).

This court further stated:

> The district court should require the grand jury to proceed with its investigation in the usual course by summoning appellant to testify. If in the course of doing so the appellant invokes his Fifth Amendment privilege, the Government can offer him immunity to compel his testimony. If appellant decides that it is in his best interest to remain silent, face confinement for contempt and possibly a subsequent indictment, rather than become a witness for the Government, and he

> knowingly and intelligently wishes to continue with Mr. Erlbaum as his counsel, the court must accept this position.

Id. at 1192.

The proper procedure for determining whether a grand jury witness has effectively waived potential conflicts of interest is set forth in *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *United States v. Mahar*, 550 F.2d 1005 (5th Cir. 1977). *Garcia* indicates that the district court must follow a procedure akin to Rule 11, F.R.Crim.Procedure inquiry and: (1) address each grand jury witness personally and advise him of the potential dangers of representation by counsel with a potential conflict of interest; (2) permit the grand jury witness to question the district court as to the nature and consequences of his legal representation; (3) elicit a narrative response from each defendant that he has been advised of his rights to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney, or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections; and (4) establish the waiver by "clear, unequivocal and unambiguous language." *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

A criminal defendant may waive the right to conflict-free representation. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). The waiver must be an "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938), and be done with "awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970).

The United States Supreme Court granted certiorari in the case of *Wheat v. United States*, 486 U.S. 153, 158, 108 S.Ct. 1692 (1988), because the court of appeals had expressed substantial disagreement about when a district court may override a defendant's waiver of his attorney's conflict of interest. However, the court did not decide whether the same analysis applies when there may be a potential for a conflict of interest when an analysis was not done at the trial regarding the specifics of what that potential conflict may be. Furthermore, the court also did not determine whether the same analysis applies when dealing with the representation of targets and witnesses at grand jury. The *Wheat* decision focuses exclusively on the issue of potential conflicts of interest where co-defendants joined for trial were being represented by the same attorney. Furthermore, in *Wheat*, the attorney proposed to represent defendant co-conspirators of varying stature in a complex drug distribution scheme. *Id.* The *Wheat* decision recommended a bar on representation by individuals not admitted to the legal profession, by an attorney whom defendant could not afford, by an attorney who declines to assume representation, and by an attorney having a prior or current relationship with an opposing party. *Id.* at 159.

In 1988, the United States Supreme Court spoke on the question of when courts may, in the context of a criminal trial, refuse to accept a defendant's waiver of conflict-free counsel and bar the defendant from retaining an attorney who also represents one or more other defendants. *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692 (1988). The Court noted that the Sixth Amendment's right to choose one's own counsel is not absolute. *Id.* 108 S.Ct. at 1697. One important limitation on that right is

the trial court's interest in ensuring that criminal trials are conducted within ethical and professional standards. *Id.* at 1697-98. The Court went on to state that

> Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear fair to all who observe them.

Id. at 1697. The Court in *Wheat*, allowed trial courts to disqualify counsel

> not only in those rare cases where an actual conflict may be demonstrated before trial, but [also] in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.

Id. at 1699. A presumption exists in favor of the defendant's selection of counsel, but it may be overcome "by a showing of a serious potential for conflict." *Id.* at 1700.

The United States Court of Appeals for the First Circuit, applied the standards ennunciated in *Wheat* in a grand jury context. *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1988). In that case, the Court of Appeals remanded the case back to the District Court, in order to develop the record in order to determine if the *Wheat* standard was met. *Id.* at 1026. Furthermore, this same Court held that generally there must be a direct link between the clients of an attorney – or at least some concrete evidence that one client, such as an immunized witness, has information about another client, such as a target of a grand jury investigation – before the right to counsel of choice is barred by disqualification. *Id.*

In the case of *United States v. Martinez*, 143 F.3d 1266 (9th Cir. 1998), the court decided that the defendant's waiver of right to conflict-free counsel was valid and applied to all conflicts foreseeable at the time of hearing, including the possibility of defendant's being called to testify against alleged coconspirator formerly represented by same counsel, the court informed the defendant of the right to conflict-free attorney and that he could ask questions or receive outside legal advice about waiving the conflict, and the defendant indicated an intent to retain counsel despite conflict. This case was decided after *Wheat*. This court stated that trial courts may allow an attorney to proceed despite a conflict "if the defendant makes a voluntary, knowing, and intelligent waiver." *Id.* at 1269, *quoting Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883-84 (1981).

Based on the foregoing, no case has definitively determined whether both targets and witnesses at a grand jury may waive their right to conflict-free representation. The Supreme Court in *Wheat* did not discuss whether it would apply in a grand jury setting or whether it would allow persons to waive any potential for conflict of interest. These are both questions that need to be answered in the case at hand. Therefore, due to the confusion of the cases cited above, we are requesting that this Honorable Court grant the within Petition for Writ of Certiorari to determine this precise issue.

II. Despite the Supreme Court Decision in *Flanagan v. United States*, the Circuit Courts Are Still in Conflict Regarding the Immediate Appealability of Disqualification Orders.

In *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051 (1984), the Supreme Court held that a district court's pretrial disqualification of defense counsel in criminal prosecution was not immediately appealable. Since this case, the Circuits have applied different rules for the disqualification of United States' Attorneys and litigants wishing to appear *pro se*. In the case of *United States v. Bolden*, 353 F.3d 870 (10th Cir. 2003), the Court decided that the disqualification of the entire United States Attorney's office was immediately appealable after the application of the collateral order rule. In the case of *United States v. Whittaker*, 268 F.3d 185 (3rd Cir. 2001), the Court also held that the disqualification of the entire United States Attorney's Office was immediately appealable under the collateral order doctrine. In the case of *Devine v. Indian River County School Board*, 121 F.3d 576 (11th Cir. 1997), the Court held that under the collateral order exception to the finality requirement, the Court of Appeals had jurisdiction over the nonfinal order allegedly infringing a father's right to appear *pro se* on his minor son's behalf. However, in the case of *In the Matter of Kelli Schmidt*, 775 F.2d 822 (7th Cir. 1985), the Court held that an order disqualifying counsel for a grand jury witness was not a final appealable order.

The above cases indicate a conflict among the Circuits regarding how *Flanagan* should be applied. In particular, in the case at bar, it is unknown if *Flanagan* applies to when an attorney is disqualified from representing both targets and witnesses during a grand jury investigation

when all have signed written waivers and have signed statements regarding the incident in question.

In order for a district court order to fall within the collateral order doctrine, it must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2182 (2003).

In *Bolden*, the Court found that the first prong was met since the disqualification order conclusively determined that the United States Attorney's Office may not represent the government in Mr. Bolden's effort to force the government to file a request for a reduction of sentence. *U.S. v. Bolden, supra*, 353 F.3d at 875. The Court also found that the second prong was met because "on the whole, orders disqualifying an entire United States Attorney's office are separate from the underlying issues." *Id.* at 875. This Court went on to find that the third prong was met since "if the government prevails at trial, it will generally lack standing as a prevailing party to appeal the decision." *Id.* at 877. *See, e.g., Jarvis v. Nobel/Sysco Food Serv. Co.*, 985 F.2d 1419, 1424 (10th Cir. 1993) (stating that "it is the general rule that a party cannot appeal from a judgment in his favor").

In *Flanagan*, the Supreme Court rejected interlocutory appellate review, in part, because it found that the defendant could obtain effective post-trial relief from the improper disqualification of his counsel because post-trial reinstatement of his counsel would remedy any injury he suffered. *Flanagan v. U.S.*, 465 U.S. at 267-68. The Court in *Bolden*, felt that no post-trial relief existed. *U.S. v.*

Bolden, 353 F.3d at 878. Furthermore, in *Flanagan*, the court, in dicta, implied the non-appealability of erroneous denial of the right to self-representation in criminal cases. *Flanagan v. U.S.*, 465 U.S. at 267-68. Despite that, the Court in *Bolden* continued to use the collateral order doctrine in determining the appealability of the nonfinal order allegedly infringing the father's right to appear *pro se* on his minor son's behalf. *Devine v. Indian River County School Board*, 121 F.3d 576 (11th Cir. 1997).

What all of the cases cited above show, is that different standards are being used for different types of disqualification orders. There is no difference between disqualifying the United States Attorney and defense counsel. In both instances, the orders may be effectively unreviewable on appeal. Just as with the United States Attorneys, if the defendant is acquitted or not indicted at grand jury, defense counsel has no standing to appeal. *See, e.g., Jarvis v. Nobel/Sysco Food Serv. Co.*, 985 F.2d 1419, 1424 (10th Cir. 1993) (stating that "it is the general rule that a party cannot appeal from a judgment in his favor"). Furthermore, the "collateral order" rule was used in prior cases regarding the appealability of orders disqualifying counsel because the representation concerns important rights which might be irretrievably lost if review were denied. *In re Investigation Before the February 1977 Lynchburg Grand* Jury, 563 F.2d 652, 655 (4th Cir. 1977), *citing In re Grand Jury Empanelled January 21, 1975*, 536 F.2d 1009, 1011 (3d Cir. 1976); *United States v. Garcia*, 517 F.2d 272, 275 (5th Cir. 1975); *In re Investigation before April 1975 Grand Jury*, 174 U.S.App.D.C. 268, 531 F.2d 600 (1976).

III. The Proceeding Involves a Question of Exceptional Importance.

The decision has an impact, not just on the litigants involved, but upon the public in its perception of the grand jury process, other targets and witnesses who wish to proceed with their counsel of choice, and attorneys nationwide who represent persons involved in grand jury investigations.

Review of the New Jersey decision through a writ of certiorari will yield a result for these litigants and for others that will stop the confusion among the Court of Appeals and restore harmony to the Circuits.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

KEVIN P. MCCANN, ESQUIRE
(Counsel of Record)
SHIRLEY A. NAYLOR, ESQUIRE
CHANCE & MCCANN, LLC

Attorneys for Petitioners, Troopers Mark Manzo, Christopher Modarelli, Keith Moyer, Joseph Carson, and Thomas Hollywood

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

IN RE THE DEATH OF ERIC QUICK	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY CIVIL ACTION OPINION

DECIDED:

Peter C. Harvey, Attorney General of the State of New Jersey, for the plaintiff (Martin C. Mooney, Sr., Deputy Attorney General, of counsel and on the brief).

Kevin P. McCann for the defendants (Chance & McCann, attorneys; Mr. McCann, on the brief).

FEINBERG, A.J.S.C.

BACKGROUND

This opinion supplements the findings and determinations made by the court at oral argument on Friday, August 27, 2004. This matter concerns a Grand Jury investigation into the shooting death of Eric Quick by New Jersey State Troopers on July 21, 2003. The record reflects that Troopers Mark Manzo, Chris Modarelli and Keith Moyer utilized deadly force and that Troopers Joseph Carson and Thomas Hollywood witnessed the shooting. Kevin McCann, Esq. ("McCann"), was notified of the incident and met with and represented all five troopers on the evening of the shooting. That night each of the troopers gave authorities a formal statement. Troopers Manzo, Modarelli and Moyer have been identified by the State as

targets while Troopers Carson and Hollywood have been named as potential State witnesses. At oral argument, the court was advised that another officer, from a local police department, was also at the scene.

On July 6, 2004, the State filed a motion to disqualify McCann from further participation in the matter. In support of the motion, the State asserts that counsel's simultaneous representation of the three targets and the two witnesses violates *R.P.C.* 1.7 and the cases that have interpreted the simultaneous representation of parties in criminal matters.

COURT'S ANALYSIS

The facts presented to the court support prohibiting Mr. McCann from representing any of the Troopers at this time. The Supreme Court of New Jersey has adopted the American Bar Association's Model Rules of Professional Conduct ("RPC") as the standards governing permissible conduct for attorneys in the State. RPC 1.7 provides, in pertinent part:

RPC 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client . . .

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultations . . . When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and the risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client. . . .

Effective January 1, 2004, the "appearance of impropriety" doctrine previously applicable in conflict of interest situations was eliminated. Pressler, *Rules Governing the Courts of the State of New Jersey*, Special Supplement Rules of Professional Conduct Revision, Introduction (2004). Prior to the revision, RPC 1.7 contained the following language:

(c) This rule shall not alter the effect of case law or ethics opinions to the effect that:

(1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial, and

(2) in certain cases or situations creating an appearance of impropriety rather

> than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

Both the Sixth Amendment to the Federal Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee "the assistance of counsel" to all criminal defendants. This right has been construed as guaranteeing the "effective assistance of counsel," or "untrammeled and unimpaired" representation, and undivided loyalty. *State v. Bellucci*, 81 *N.J.* 531, 538 (1980) (quoting *Glasser v. United States*, 315 U.S. 60, 70, 62 *S.Ct.* 457, 86 *L.Ed.* 680 (1941)). However, neither the State nor federal Constitutions provide an absolute right to counsel of one's choosing. *State v. Coon*, 314 *N.J. Super.* 426, 438 (App. Div. 1998); *Wheat v. United States*, 486 *U.S.* 153, 159, 108 *S.Ct.* 1692, 100 *L.Ed.2d* 140 (1988). Furthermore, neither witnesses before, nor targets of a grand jury investigation have a constitutional right to counsel. *State v. P.Z.*, 152 *N.J.* 86, 110 (1997) (holding that right to counsel attaches upon the return of indictment); *State v. Cattaneo*, 123 *N.J. Super.* 167, 172 (App. Div. 1973) (witness before grand jury has no right to counsel).

At the outset, it is not insignificant to note that "[p]olice officers, by the very nature of their duties, are exposed to substantial risk that . . . civil or criminal actions will be initiated [against them], regardless of their merits." *Van Horn v. City of Trenton*, 80 *N.J.* 528, 536-37 (1979). In *State v. Land*, 73 *N.J.* 24, (1977), the Supreme

Court of New Jersey discussed the difficulty that inheres when an attorney undertakes the representation of more than one defendant in a criminal matter.

> The constitutional right to the 'assistance of counsel' contemplates that the attorney's position as an advocate for his client should not be compromised before, during or after trial. In representing more than one defendant, where divergent or conflicting positions may exist, an attorney's representation will probably not be as effective as it might have been if he had one client. The inherent difficulty in representing more than one defendant in a criminal proceeding and in steering a course which will promote the interests of each, but which will not be to the detriment of any one, exposes the infirmity of dual representation.
>
> [*Land, supra*, 73 *N.J.* at 30.]

"The pervasive practice of plea bargaining highlights the importance" of having effective assistance of counsel at the pretrial stage as well as at trial. *State v. Bellucci*, 81 *N.J.* 531, 540 (1980). The court has also noted that the principle of attorney-client confidentiality might further compromise the attorney's effectiveness because he may obtain confidential information that may assist one defendant, to the detriment of another. *Land, supra*, 73 *N.J.* at 30; *Bellucci, supra*, 81 *N.J.* at 539. When an attorney's performance is hampered in this manner, the defendant's interests are not "being protected to the fullest extent consistent with . . . the standards of professional conduct." *Land, supra*, 73 *N.J.* at 30.

Although the *Land* court clearly disfavored attorneys representing more than one defendant in the same criminal

case, it nevertheless concluded that a defendant is free to waive his right to independent counsel.

> Underlying the principle that an attorney should represent only one client is the assumption that a conflict exists or may exist between codefendants. Although not apparent, the conflict may surface during the course of trial. However, there may be circumstances where no conflict exists. Or, even if the possibility of divergence is present, the defendants tactically may desire one counsel. Since a single attorney eliminates reciprocal attacks and a joint defense may have a certain jury appeal, defendants may desire joint representation, irrespective of the possible conflict. It is their right to have such representation, for parties may surrender their constitutional right to independent counsel.
>
> [*Id.* at 32 (citing *Johnson v. Zerbst*, 304 *U.S.* 458, 58 *S.Ct.* 1019, 82 *L.Ed.* 1461 (1937)).]

Usually this type of analysis arises in the context of a tribunal reviewing a convicted defendant's claim on appeal. The instant question before the court is especially difficult because the court:

> must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier, pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of

> the Government's witnesses will say on the stand. A few bits of unforeseen testimony . . . may significantly shift the relationship between multiple defendants.
>
> [*Wheat, supra*, 486 *U.S.* at 162-63.]

In *State v. Davis*, 366 *N.J. Super.* 30, 44 (App. Div. 2004), the court evaluated the effect of the recent amendments to RPC 1.7, and stated "that appearance of impropriety concerns have not been rendered wholly moribund" when considering motions to disqualify counsel because of conflicts of interest. The *Davis* court further noted that a "court maintains an independent interest in assuring that conflict-free representation occurs, since the existence of conflict undermines the integrity of the court." *Id.* at 38.

The Supreme Court eliminated the "appearance of impropriety" as a standard governing the ethical conduct of attorneys based upon the recommendation of the Commission on the Rules of Professional Conduct (Pollock Commission). The Pollock Commission found the standard unworkable because it is too vague and ambiguous to be useful to attorneys in determining the propriety of a given representation. *Id.* at 43.

> Although the Pollock Commission, found the appearance of impropriety rule to be inappropriate as a basis for attorney discipline, it found in a further recommendation adopted by the Court that **a court properly may consider the appearance of impropriety as a factor in determining that ... representation poses an unwarranted risk of disservice either to the public interest or the interest of the client.**
>
> [*Id.* at 44 (emphasis added).]

The State asserts that the conflict presented in this case, similar to the situation analyzed by the Supreme Court in *In re Garber*, 95 *N.J.* 597 (1984), cannot be cured by use of a waiver. *Garber* involved a disciplinary proceeding concerning an attorney who represented DeVault, the sole eyewitness to a "gangland style" murder. DeVault informed the authorities that Leonetti, an individual allegedly associated with organized crime, was the murderer. After being assigned police protection, DeVault began to have second thoughts about his position, and sought a way to extricate himself from his involvement in the case. Through his employer, a covert meeting was arranged between DeVault and Garber, an attorney, who recorded DeVault recanting his identification of Leonetti as the murderer. Later, DeVault signed a statement indicating that Garber was representing him, and refused further police protection.

Garber also had a close personal relationship with the Leonetti's uncle, Nicodemo Scarfo, who was reputed to be a highly placed organized crime figure. Furthermore, after being retained by DeVault, Garber represented Leonetti in municipal court for a traffic violation. The State cites *Garber* as standing for the proposition that under no circumstances may an attorney represent a witness in a criminal matter when that attorney also represents a defendant in that matter.

> Under no circumstances and by no stretch of the imagination could an attorney with any propriety ever represent an eyewitness or a material witness to a crime and also represent or become professionally associated with, the individual charged with the commission of such a crime.
>
> [*Garber, supra,* 95 *N.J.* at 608.]

In addition to finding that Garber's representation of DeVault was impermissible due to an actual conflict of interests, the court found the appearance of impropriety resulting from Garber's conduct worthy of sanction. *Id.* at 611. "Not only is it unethical for counsel to improperly influence a witness in his testimony but it is as well improper for him to place himself in a position where he could influence a witness in a manner to color his testimony favorable to his client." *Id.* at 608 (quoting *In re Cohn*, 46 *N.J.* 202, 212 (1966)).

The *Garber* court feared that, under the circumstances, multiple-representation by counsel would result in a lack of public confidence in the integrity of the administration of justice. The court stated:

> And should the public so believe, and thus suspect the outcome of the litigation proceeded from undue influence upon the policeman's testimony, and not from the merits, there is a sure result. The doubts thus engendered or suspicions aroused ("these fellows all stick together") impoverish the appearance of justice and taint the image of law and its even-handed enforcement.
>
> [*Id.* at 610 (quoting *State v. Galati*, 64 *N.J.* 572, 576 (1974).]

Based exclusively on the "appearance of impropriety" doctrine, the Supreme Court, in *Galati*, found a police union attorney's defense of one of the union's members against criminal charges improper, when another of the union's members was a witness in the case, even though the witness' testimony was thought to be favorable to the defense. In *Galati*, it was the relationship between the witness and the attorney's other client, the police union, which greatly concerned the court.

The *Garber* court held that the conflict presented in that case was not subject to waiver. *Garber, supra*, 95 *N.J.* at 614. "There are certain conflicts which are so egregious that they cannot be cured by consent." *Ibid.* The State asserts that the status of two of the Troopers as witnesses requires the same result in the instant matter. "[S]ometimes an attorney, guiltless in any actual sense, nevertheless is required to stand aside for the sake of public confidence in the probity of the administration of justice." *Id.* at 610. The court and the public have a legitimate interest that the administration and enforcement of the criminal laws appear fair to all who observe them. This interest is independent of the client's interest in unconflicted representation. *Wheat, supra*, 486 U.S. at 160; *Bellucci, supra*, 81 *N.J.* at 544.

In the Matter of Grand Jury Proceedings, 428 *F.Supp.* 273 (E.D. Mich. 1976), the court disqualified two lawyers who represented both the targets of, and several witnesses before a grand jury. The court held that "the public has an overriding interest to see that the grand jury investigation in this matter be allowed to uncover the truth free of any potential obstructions arising from a conflict of interest in multiple representation." *Id.* at 278. The court stated that although witnesses before a grand jury may be able to waive their rights to unconflicted representation, "they cannot at the same time *waive* the right of the public to an effective functioning grand jury investigation." *Ibid.*

Defendants argue that *Garber* is drastically different factually from the case at bar and its holding does not control the resolution of this motion. First, the troopers argue that unlike *Garber,* in this matter no one has been charged with any crime. Rather, there is an ongoing grand jury investigation into the events that led to the Death of

Eric Quick. The Troopers argue that: (1) while the designation of three of the troopers as targets and two of them as witnesses creates the potential for conflict, it does not create an actual conflict under either a constitutional or ethical standard; (2) the relationship between the parties at issue in each of the cases is very different; and (3) the personal and social relationship between the parties and counsel in *Garber*, is different from their relationship with McCann.

Finally, the Troopers assert that their status as law enforcement officers is significant. As noted above, by the very nature of their jobs, police officers are oftentimes be [sic] required to defend civil and criminal matters regardless of the merits of the accusations. As a result, the Troopers submit that the State's reliance on the decision reached in *Garber* is misplaced.

The court holds that, based on the unique and specific facts in this case, further representation of the Troopers by McCann is not appropriate. While the facts of this case and *Garber* are drastically different, they do share a common theme. To maintain the integrity of the process and to afford the troopers an opportunity for impartial and neutral representation, it is improper for an attorney to represent a party in a proceeding and a witness who will be testifying at the same proceeding. Prior to the State's identification of three of the Troopers as targets and two as witnesses, each stood in the same relative position. However, at the point in time when the three were identified as targets and two as witnesses, the status of the parties changed. As a result, it is now inappropriate for McCann to continue serving as counsel.

The court is satisfied that the concurrent representation of targets and witnesses pre-indictment, should be handled in the same manner a court would address concurrent representation of defendants and witnesses post-indictment. The suggestion that, for some reason, the system should accommodate the multiple-representation of targets and witnesses by an attorney at the pre-indictment stage is flawed. Simply put, there is no reason to draw a distinction; defendants and witnesses in the same proceeding should not be represented by the same attorney.

The witness holds a special place in our system of jurisprudence. It is commonplace during the course of a trial for a witness to be challenged. The court's decision today is not based on the substance of the Trooper's testimony, their relationship to each other or to Mr. McCann; it is based on the public's and the court's interest in conducting judicial affairs in an atmosphere of integrity and fairness.

The court rejects any notion that the State identified three of the Troopers as targets merely to "manufacture a conflict" to remove McCann from the proceedings. No such conduct has been attributed to the State, nor should it in this case. Based on the facts, and after a thorough review of the evidence, the State made a decision to name the three Troopers who discharged their weapons as targets and the remaining two as witnesses.

Without questions, there is a real potential for a conflict to arise at some point in the future. While it is unnecessary to evaluate the likelihood of such an occurrence inasmuch as the court's holding is based upon public policy considerations, some discussion of the type of

conflict that may arise is warranted. As noted by the State in its reply brief, if one of the grand jurors elects to question of [sic] one of the Troopers concerning an inconsistency in their statements, observations or actions and that Trooper wishes to consult with McCann, his duty of confidentiality may be compromised.

McCann has characterized the differences in the Troopers' statements as "slight" or "nominal" and related only to the Trooper's viewpoint of the incident. While this characterization may be appropriate as to some of the differences in the statements, it cannot be said that all of the differences in the statements are trivial. Specifically, the conflict in the Troopers' testimony relating to whether the area was searched for weapons, or whether Quick tried to communicate with the Troopers before he was shot, may be significant to one or more of the jurors and may [sic] a subject upon which extended questioning is appropriate. The potential for a conflict to arise at some point in the future in this case should not be dismissed as unlikely. As suggested by the State in its brief, this case, like *Garber* is one of the cases where the conflict cannot be cured by client consent.

The facts of this case notwithstanding, the public interest in having judicial proceedings conducted in an untainted atmosphere demands that an attorney be precluded from representing both a party in a matter, and a witness who will be testifying in the same matter. Prior to the amendment of RPC 1.7, this situation would clearly have been impermissible. By removing the "appearance of impropriety" doctrine from RPC 1.7, the Supreme Court did not intend to divest our courts of their discretion to take the actions that are necessary to protect the integrity of judicial proceedings. Accordingly, the State's motion to

disqualify McCann from any further participation in this matter is granted.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
BY: MARTIN C. MOONEY, SR.
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

IN RE THE DEATH OF ERIC QUICK	CRIMINAL ACTION ORDER

This matter having been opened to the Court by Martin C. Mooney, Sr., Deputy Attorney General, attorney for the State of New Jersey and the Court having read the papers all opposition, and listened to oral argument,

IT IS on this 21st day of September, 2004,

ORDERED that the State of New Jersey's motion to disqualify Kevin P. McCann, Esq. from further representation in this matter is granted.

/s/ Linda R. Feinberg
Honorable Linda R. Feinberg,
A.J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART MERCER
COUNTY, NEW JERSEY DOCKET NO.
CJ-2003-5177-SRT

IN RE: THE DEATH OF ERIC QUICK	)))	CONFIDENTIAL HEARING

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: August 27, 2004

SEALED TRANSCRIPT

BEFORE:

HON. LINDA R. FEINBERG, J.S.C.

TRANSCRIPT ORDERED BY:

KEVIN P. Mc[C]ANN, ESQ. (Chance & McCann, LLC)

APPEARANCES:

MARTIN C. MOONEY, SR., Deputy Attorney General
MARY E. McANALLY, Deputy Attorney General Attorneys for the State

KEVIN P. Mc[C]ANN, ESQ. (Chance & McCann, LLC)
SHIRLEY A. NAYLOR, ESQ. (Chance & McCann, LLC) Attorneys for the Defendant

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* * *

[58] THE COURT: Trooper Moyer? Okay. And I have Trooper Manzo?

MR. MANZO: Yes, ma'am.

THE COURT: Okay. Trooper Motorelli?

MR. MOTORELLI: Here.

THE COURT: Okay. And Trooper Carson?

MR. CARSON: Here.

THE COURT: Okay. We've engaged in a dialogue on the record. And let me tell you my dilemma. First of all, I understand very well how anxious all of you are to have this resolved. I do appreciate that. This is a very unusual case. Most cases that come before the Court – even the Deputy Attorney General indicated, while you were out of the room – involve one trooper who may have discharged his or her weapon, but not three. And I'm not being critical. It's just the reality that we have three.

And at some point in time, the State makes a decision to identify some as targets and some as witnesses. And it's based on the evidence. It doesn't necessarily mean that anything – that the Grand Jury would return an indictment.

It's a designation, based on facts. Okay? The case will be presented. The Grand Jury will make a determination.

If, hypothetically, there was an indictment [59] returned in any case, the same lawyer can't represent defendants and the witnesses, regardless of much the witnesses and defendants may want them to – that lawyer – because the lawyer is very capable, very competent, has a good reputation, has been involved in those kinds of cases – like Mr. McCann. It couldn't happen. It just couldn't happen, because the Court will take the position that there is a conflict, just by the very nature of who the parties are. And that's why I ask the question, how is this really different? And in my judgment, it's really not any different.

Now, I've thought long and hard, because I understand you've been living with this for a long time and you want it over. And so, I've been sensitive to the fact that if I pull Mr. McCann – that because of the nature of the case at this stage, he should not be participating – that it would put you in a position where you'd have to get new lawyers. And I understand that that's emotionally taxing, probably physically – just the process in thinking about – and you feel comfortable with Mr. McCann, which is understandable. So, that would be something that would be difficult.

I've confronted that and I've looked at that and I've dealt with it. But I am still of the position that because of where this case is now, and the Grand [60] Jury process – the way it's designed to work – and the advice that each of you will be required to seek from counsel, and the potential diversity of interest – even though you've waived that – that it would not be appropriate for Mr. McCann to represent you.

Now, having said that, I've had a conversation with Mr. McCann. And there's a real issue in these kinds of cases – when you have a shooting like this – and a very capable, competent lawyer like Mr. McCann ends up on the scene. I find that he did nothing inappropriate. He did what a lawyer would do at that particular point in time, in gathering information. And I think he made an assessment early on – at least at that point – that the information was so comparable, that he concluded that at that point, there was no adversity. And I'm not saying that that was a wrong decision.

At that point, no one knew exactly what would happen. But once the State decided to formulate different designations of the parties, that's when his ability to continue, I think, was sort of made – at least in my judgment.

I am going to issue a written opinion. But my decision today is that he can no longer represent you. I assume the union will be providing service.

[61] And I don't know who is going to be providing services to the troopers, but they're going to need some time to secure the services of counsel. And I think that 60 days is probably – do you have any objection to 60 days?

MR. MOONEY: No, Your Honor. We, you know, we'd like to go as soon as we can. But tantamount to that, they must feel comfortable with their new attorneys and get –

THE COURT: Yes. I want to make sure that they have sufficient opportunity to consult with counsel and make that decision. And there may be different

decisions made, depending upon whether you're a target or you're a witness.

MR. MOONEY: That's true.

THE COURT: And I don't know. Of course, there may be some potential civil exposure. I don't know. And the witnesses may decide that – well, they'll need to make that decision. I would assume that all of you would at least want to have a consultation with an attorney, and then decide how you're going to proceed from there. This case is different than any other reported case. And it's been a tough decision for me.

And I don't make these decisions lightly, [62] because I know the consequences to you, in terms of having to secure services. But I think, under the rule, this is really the only choice that I have. I am going to issue a written opinion. I'll work on it next week. And I'll disseminate a copy to counsel. If you would prepare an order, I'm sure I'll have it done by next Tuesday. I'll work on it. Is there an order in the file? There's an order?

MR. MOONEY: Your Honor, I think we submitted a form of order.

THE COURT: All right. All right. I'll try to have this done by Tuesday. Counsel, thank you.

MR. McCANN: Thank you.

MR. MOONEY: Thank you, Your Honor.

MS. McANALLY: Thank you.

* * *

[63] CERTIFICATION

I, Shirley Nenno, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number CR94-04LRF, index number 20 to 4527, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

/s/ Shirley Nenno
SHIRLEY NENNO

Approved by:

/s/ Johanna LiMato
JOHANNA LiMATO AOC #179

Date: 10-4-04

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Attorneys for Troopers Modarelli, Manzo,
Moyer, Hollywood, and Carson

IN RE THE DEATH OF ERIC QUICK	) SUPERIOR COURT OF) NEW JERSEY) LAW DIVISION) MERCER COUNTY) **ORDER**

(Filed Dec. 3, 2004)

This matter having been opened to the Court by Chance & McCann, LLC, attorney for State Troopers Modarelli, Manzo, Moyer, Hollywood and Carson, and the Court having reconsidered its decision of August 27, 2004;

IT IS on this 3rd day of December, 2004,

~~ORDERED that Kevin P. McCann, Esquire, be and he is hereby permitted to represent the above named troopers regarding the within action.~~ [Denied. Application for stay denied. State shall not present case to State grand jury for a period of sixty days to provide troopers the opportunity to consult with and secure the services of counsel. /s/ LRF]

/s/ Linda R. Feinberg
LINDA R. FEINBERG,
A.J.S.C. A.J.S.C.

IN RE THE DEATH OF ERIC QUICK

DOCKET NO. MER-L-2763-04

MOTION TO RECONSIDER

December 3, 2004

This matter comes before the court by way of motion for reconsideration filed by Chance & McCann, L.L.C., to permit counsel to continue representation of Troopers Mark Manzo, Chris Modarelli, Keith Moyer, Thomas Hollywood and Joseph Carson. Opposition has been filed by the State.

BACKGROUND

This matter concerns a Grand Jury investigation into the shooting death of Eric Quick by New Jersey State Troopers on July 21, 2003. The record reflects that Troopers Mark Manzo, Chris Mod[a]relli and Keith Moyer utilized deadly force and that Troopers Joseph Carson and Thomas Hollywood witnessed the shooting. Kevin McCann, Esq. ("McCann"), was notified of the incident and met with and represented all five troopers on the evening of the shooting.

On July 6, 2004, the State filed a motion to disqualify McCann from further participation in the matter pursuant to *R.P.C.* 1.7 and 1.9. On August 27, 2004, after an *in camera* hearing, the court issued an oral opinion granting the State's disqualification application. In essence, the court disqualified counsel from providing representation to the three troopers named as targets; to wit, the Troopers who utilized deadly force and to the two troopers named as witnesses. On August 31, 2004, the court issued a formal written opinion. While, for purposes of this application,

the court need not repeat in detail the analysis set forth therein, the court held that "[t]o maintain the integrity of the process and to afford the troopers an opportunity for impartial and neutral representation, it is improper for an attorney to represent a party in a proceeding and a witness who will be testifying at the same proceeding." *In Re The Death of Erik Quick,* at 12-13 (Aug. 31, 2004) (no Docket No., as the matter was under seal). On September 21, 2004, the court signed a disqualification order.

On October 22, 2004, Shirley A. Naylor, Esq., of Chance & McCann, L.L.C., filed a motion to reconsider the court's decision of August 27, 2004. Ms. Naylor argues that: (1) the decision to disqualify counsel is directly contrary to other decisions in the Superior Court of New Jersey, citing *State v. Williams C. Severs,* Indictment No. 04-02-00181 (September 10, 2004); (2) the court should not have relied on *In Re Garber,* 95 *N.J.* 597 (1998); (3) the court should have given more emphasis to McCann's specialized knowledge in this case; and (4) in the alternative, if the court does not reconsider the prior decision, a request for a stay pending appeal.

In response to the motion for reconsideration, the State asserts that: (1) the motion is time-barred; (2) the court's decision was properly based on a rational analysis of the facts and case law; and (3) McCann has not satisfied the requirements under *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), to warrant a stay.

ANALYSIS

A motion to alter or amend a judgment or order is found under *R.* 4:49-2. Rule 4:49-2 states:

> Except as otherwise provided by *R.* 1:13-3 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement or the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.
>
> [*R.* 4:49-2.]

First, the court rejects the notion that the motion, filed on October 22, 2004, is time-barred. Relying on the representation of counsel that the signed disqualification order was received on October 6, 2004, the motion was filed within twenty days as required by *R.* 4:49-2.

Second, reliance by counsel on the decision by Judge Farrell, J.S.C. in *State v. Severs* is misplaced. The facts in *Severs,* as elicited from the extensive questioning by Judge Farrell, establish dramatically different facts from those in the case before this court. A review by this court of the seventy-four pages of the proceedings, disclose that in *Severs,* the defendant's sisters and mother met with the defense attorney to acquire legal representation for the defendant. The record is clear that, at no time, did the defendant's sisters or mother suggest, seek or request legal representation for anyone other than the defendant. Furthermore, the record established that the sister and mother, if called as witnesses, were not adverse to the defendant. While the court questioned the defendant about a potential conflict, there was nothing in the record to suggest any potential adversity between the defendant and his sisters and mother.

The court, in *Severs,* made a specific finding that any advice given by the defense attorney was not intended or related to their grand jury appearance. Based on the facts in *Severs,* Judge Farrell applied the law correctly and permitted the representation of counsel. That decision, however, has no applicability to the case before this court involving the five state troopers.

In the case at bar, as noted in the courts August 31, 2004 opinion, counsel represents and has administered legal advice to all five troopers; to wit, the three identified as targets and the two to be called as direct witnesses. Clearly, the facts in this case and those in *Severs* bear little, or no resemblance. In the case at bar the conflict is clear and one that cannot be waived. Simply put, an attorney cannot simultaneously represent a party and a testifying witness in the same proceeding.

The court finds that counsel has failed to meet the standard set forth in *R.* 4:49-1, to "state with specificity the basis on which it is made, including a statement or the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." *Ibid.* For the reasons set forth herein, there is nothing the court overlooked. Additionally, the court is satisfied that there was no error.

Last, counsel seeks a stay pending an appeal. When seeking a stay pending appeal the applicant must demonstrate that: (1) irreparable harm will result from enforcement of the judgment pending appeal; (2) the appeal presents a meritorious issues [sic], and the applicant has a likelihood of success on the merits; and (3) assessment of the relative hardship to the parties reveals that greater

harm would occur if a stay is not granted than if it were. *Crowe v. DeGioia,* 90 *N.J.* 125, 132-34 (1982).

In the case at bar, the standards for a stay have not been met. First, no irreparable harm will result from enforcement of the judgment pending appeal. In fact, during oral argument on August 27, 2004, through counsel, the troopers expressed a desire for this case to proceed expeditiously. This court appreciates the personal and professional consequences created by the pending investigation and the desire to be represented by counsel. As a result, the court directs that the matter not be presented to a grand jury for a period of at least sixty-days. This time period will provide sufficient time for the parties to consult with and secure the services of counsel.

Second, as set forth in the court's August 27, 2004 oral opinion, August 31, 2004 written opinion and the written opinion on the motion for reconsideration, the court finds that the legal issues weigh in favor of the State. Last, in assessing the relative hardship of the parties, the court is satisfied that, once again, the greater hardship is with the State.

The application for a stay is denied. The troopers shall be afforded a period of sixty-days to secure the services of counsel, if they choose.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART MERCER
COUNTY, NEW JERSEY DOCKET NO.
MER-L-2763-04
A.D. # _____

IN RE:	)	TRANSCRIPT
THE DEATH OF	)	OF
ERIC QUICK	)	HEARING

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: December 3, 2004

BEFORE:

HON. LINDA R. FEINBERG, A.J.S.C.

TRANSCRIPT ORDERED BY:

KEVIN P. McCANN, ESQ. (Chance & McCann)

APPEARANCES:

MARTIN C. MOONEY, DAG
MARY E. [McANALLY], DAG
Attorneys for the State

KEVIN P. Mc[C]ANN, ESQ. (Chance & McCann)
Attorneys for the Troopers

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Audio Recorded
Audio Operator, Crystal Wilson

* * *

[12] THE COURT: Right. I understand that, but there's got to be some period of time for them to secure counsel. Are you suggesting that I should truncate the period below 60 days?

MR. MOONEY: Your Honor, we are scheduled – everyone's subpoenaed. At the Court's request, we put off today's grand jury hearing until next Friday. We really – so we're ready to go. It's going – at a minimum, the evidence in this case –

THE COURT: When is it scheduled?

MR. MOONEY: December 10th at 10:00 a.m.

THE COURT: You're not going to do it December 10th.

MR. MOONEY: And –

THE COURT: They need more time than that. They need to get – they need to have the opportunity to consult with counsel if they want.

MR. MOONEY: But, Your Honor, you gave that to them. They refused.

THE COURT: I understand that. Well maybe I would change that time period to less than 60.

MR. MOONEY: I don't know how many bites at the apple they get. That's our concern.

THE COURT: Yes. No, I understand. Yes.

MR. MOONEY: And we feel quite confident if [13] the troopers union takes this up to the Appellate Division, that your opinion will be affirmed.

THE COURT: All right.

MR. MOONEY: There doesn't seem to be any –

THE COURT: Right.

MR. MOONEY: – any argument there.

THE COURT: Yes. Well then maybe I would be inclined to truncate the time period maybe down to 30 days.

MR. McCANN: Your Honor, I can tell you – I mean the appeal will be filed Monday.

THE COURT: Yes. All right, so –

MR. McCANN: There's no question, and I'm figuring that an abbreviated and accelerated time to go through the Appellate Division and to the Supreme Court, if it takes going there, will take 60 days. That's why when you said 60 days, I thought that was perfect.

THE COURT: All right. Thank you.

MR. MOONEY: We agree with Your Honor's decision to deny this stay. There's no rational reason or legal support for a stay to be granted in this case.

THE COURT: All right. A motion – I'm just going to put some statements on the record. A motion to alter amended judgment or order is found under Rule [14] 4:49-2, and it provides – and I'll quote – "Except as otherwise provided by Rule 1:13-3, a motion to rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis

upon which it is made, including a statement or the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred."

First, the Court rejects the notion that the motion filed on October 22nd is time barred, relying on the representation of counsel that the signed disqualification order was received on October 6th. The motion was filed within the 20 days as required by Rule 4:49-2.

Second, reliance by counsel on the decision by Judge Farrell in *State vs. Seavers*, is misplaced. The facts in *Seavers*, as elicited from the extensive questioning by Judge Farrell, establish dramatically different facts from those in the case before this court. A review by this Court of the 74 pages of the proceedings disclose that in *Seavers* the defendants sisters and mother met with a defense attorney to acquire legal representation for the defendant, and [15] it's unclear whether it was once or twice, but it was at least once.

The record is clear that at no time did the defendant's sisters or mother suggest, seek, or request legal representation for anyone other than the defendant. Furthermore, the record established that the sister and mother, if called as witnesses, were not adverse to the defendant. While the Court questioned the defendant about a potential conflict, there was nothing in the record to suggest any potential adversity between the defendant and his sisters and mother.

I would indicate off of my written write up that there was some discussion on the record as to potential adversity, and Mr. Seavers indicated that while there was really no adversity, which was part of the record, he accepted whatever testimony they would give. The Court in *Seavers*

made a specific finding that any advice given by the defense attorney was not intended or related to their grand jury appearance.

Based on the facts in *Seavers*, Judge Farrell applied the law correctly and permitted the representation of counsel. That decision, however, has no applicability to the case before this Court involving the five state troopers.

[16] In the case at bar, as noted in the Court's August opinion, counsel represents and has administered legal advice to all five troopers, to wit, the three identified as targets and the two to be called as direct witnesses. Clearly, the facts in this case and those in *Seavers* bear little or not [sic] resemblance. In the case at bar the conflict is clear, and one that cannot be waived. Simply put, an attorney cannot simultaneously represent a party and a testifying witness in the same proceeding.

The Court finds that counsel has failed to meet the standards set forth in Rule 4:49-2, and I quote, "State with specificity the basis on which it is made, including a statement or the matters or controlling decisions which counsel believes the Court has overlooked or as to which it has erred." For the reasons that I've stated, there is nothing that the Court overlooked. Additionally, the Court is satisfied that there was no err [sic].

Last, counsel seeks a stay pending appeal. When seeking a stay pending an appeal, the applicant must demonstrate that irreparable harm will result from enforcement of a judgment pending appeal, that the appeal presents a meritorious issue, and that the applicant has likelihood of success on the merits, and [17] (3) assessment of the relative hardship to the parties reveals

that greater harm would occur if a stay is not granted than if it were.

In the case at bar the standards for a stay simply have not been met. First, no irreparable harm will result from enforcement of the judgment pending appeal. In fact, during oral argument on August 27th, 2004 through counsel the troopers expressed a desire for this case to proceed expeditiously. This Court appreciates the personal and professional consequences created by the pending investigation and the desire to be represented by counsel. As a result, the Court directs that the matter not be presented to the grand jury for a period of at least 60 days. This time will provide sufficient time for the parties to consult with and secure the services of counsel.

Second, as set forth in the Court's oral opinion on August 27th, the August 31st written opinion, and this particular decision, the Court finds that the legal issues weigh in favor of the State.

Last, in assessing the relative hardship of the parties, the Court is satisfied that once again the greater hardship is with the State.

Therefore, the application is denied. I've given some thought to truncating the time period, but [18] quite frankly, I think the issues are important enough that I'm going to retain my original position of 60 days. I'll sign ar order today if there's one in the file. Let me just see.

MR. McCANN: May I approach?

THE COURT: Yes.

MR. McCANN: I didn't know about the 60 days, but I have everything else.

THE COURT: Well, I can add that. Why don't I just do that, and I can add that?

MR. MOONEY: May I see it, counsel?

MR. McCANN: Oh, yes. I'm sorry.

MR. MOONEY: Is that the original?

MR. McCANN: That is.

MR. MOONEY: That's your –

MR. McCANN: Oh, did I submit it with it?

MS. McANALLY: Yes.

MR. McCANN: Okay. Yes, that's it.

THE COURT: Okay. Well, why don't I have, because I'm not sure I could find it in here? It's probably in here. I'm sure it's here. Let me see. I'm sure its here. Thanks. Oh, I have it. I do have it. You can take that. Yes, I have it.

MR. McCANN: Judge, would it be possible to get a copy of your –

[19] THE COURT: I'll give it to you today.

MR. McCANN: – what you wrote. What you read, also?

THE COURT: Sure.

(Off the record – on the record)

(Recording continues as follows:)

MR. MOONEY: . . . reschedule this in the week of February 10th.

THE COURT: Okay. Fine. All right.

* * *

CERTIFICATION

I, PATRICIA C. REPKO, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tapes number 3 and 4, index numbers 4500 to the end and 001 to 112, respectively, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

/s/ Patricia C. Repko Date 12/9/04
PATRICIA C. REPKO AOC #432
J&J COURT TRANSCRIBERS, INC.

ORDER ON MOTION

IN RE THE DEATH OF ERIC QUICK	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A -001678-04T2 MOTION NO. M -002937-04 BEFORE PART: E JUDGE(S): FALL PAYNE

MOTION FILED: JANUARY 31, 2005
BY: STATE OF NEW JERSEY

ANSWER(S) FILED:

SUBMITTED TO COURT: FEBRUARY 09, 2005

ORDER

(Filed Feb. 22, 2005)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 17TH DAY OF February, 2005, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY RESPONDENT – TO DISMISS THE APPEAL	(X)	( )	( )

SUPPLEMENTAL:

The appeal is dismissed as interlocutory. We cannot conclude that the interests of justice warrant granting leave to appeal *nunc pro tunc*. *R.* 2:2-5. *See State v. Reldan*, 100 *N.J.* 187, 205 (1985) (noting that the power to grant leave to appeal is highly discretionary and exercised only sparingly). Moreover, given the clear conflict in representation and disservice to the public by

joint representation and the probability of coordination of defenses, the probability of success on appeal is minimal.

FOR THE COURT:

/s/ [Illegible]
ROBERT A. FALL J.A.D.

ORDER ON MOTION

IN RE THE DEATH OF ERIC QUICK

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -001678-04T2
MOTION NO. M -002937-04
BEFORE PART: E
JUDGE(S): FALL
PAYNE

MOTION FILED: FEBRUARY 02, 2005
BY: CHRIS MODARELLI

ANSWER(S) FILED: FEBRUARY 07, 2005
BY: STATE OF NEW JERSEY

SUBMITTED TO COURT: FEBRUARY 09, 2005

ORDER

(Filed Feb. 22, 2005)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 17th DAY OF February, 2005, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY APPELLANT – FOR STAY, OR, IN THE ALTERNATIVE, – POSTPONE GRAND JURY PRESENTMENT	( )	(X)	(X)

SUPPLEMENTAL:

In light of our dismissal of this appeal in M-2937-04, the motion for a stay or postponement of the grand jury proceedings is denied. Judge Feinberg

permitted defendants 60 days to retain new counsel. Due to the delay occasioned by these motions, defendants are granted an additional 30 days.

FOR THE COURT:

/s/ [Illegible]
ROBERT A. FALL J.A.D.

SUPREME COURT OF NEW JERSEY
M-1107 September Term 2004
57,678

IN RE DEATH OF
ERIC QUICK

ORDER

(Filed May 3, 2005)

This matter having been duly presented to the Court, it is ORDERED that the motion of Chris Modarelli, et al., for leave to appeal is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 29th day of April, 2005.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME
COURT